

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
High-Cost Universal Service Support)	WC Docket No. 05-337
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45

**COMMENTS OF THE WYOMING OFFICE OF CONSUMER ADVOCATE
ON THE REFORM OF THE HIGH-COST UNIVERSAL SERVICE PROGRAM
PARTICULARLY AS DESCRIBED IN
THE JOINT BOARD'S RECOMMENDED DECISION**

Submitted April 17, 2008

Introduction

On January 29, 2008, the Federal Communications Commission (Commission) released a Notice of Proposed Rulemaking (NPRM) seeking comment on ways to comprehensively reform the high-cost universal service program. The NPRM was one of three related NPRM proposals relative to universal service high-cost reform that were issued concurrently. The other two related to the use of reverse auctions and the elimination of the identical support rule. The Wyoming Office of Consumer Advocate (WYOCA) is filing individual comments in each of the three NPRMs but the comments are interrelated. We ask that all three sets of comments be considered together as part of the comprehensive package of reform.

The proposals for universal service funding reform that are reflected in the Commission's NPRM are the reforms recommended by the Federal-State Joint Board on Universal Service (Joint Board) in its November 20, 2007, Recommended Decision. The overall concept of the proposal is to establish three distinct funds to replace the current high-cost support mechanism: a Mobility Fund, a Broadband Fund, and a Provider-of-Last-Resort Fund. Each fund has separate characteristics, advantages and disadvantages.

The WYOCA finds that the three fund concept has a great deal of appeal and suggests that the three fund concept warrants careful study and consideration. However, there are some aspects of the specific implementation details that cause some concern for the WYOCA. There are also quite a few details yet to be determined and as we all know “the devil is in the details.” The WYOCA’s concerns are discussed below.

The Need for Reform

For the past few years, there has been a growing movement to implement some fundamental reforms to the high-cost portion of the universal service fund. Three primary reasons seem to be behind the drive for reform: concerns about the growth in the fund, concerns about fraud and abuse within the system, and real or perceived distribution and contribution inequities. The WYOCA acknowledges a basis for concern within each of these categories. However, it is clear in reading the Joint Board’s Recommended Decision that not each of these concerns is adequately addressed within the recommendations. In addition to commenting on the recommendations that have been delineated by the Joint Board, the WYOCA also provides within these comments additional suggestions for ways to address the fundamental concerns with the current high-cost system.

The growth in the fund is often the first concern that is raised when discussing the need for reform. The most common chart in a USF presentation these days is the bar chart that shows the growth in the fund from zero to almost \$4.5 billion within 20 years, and the near doubling of the fund in just the past seven years. This recent exponential growth in the fund is appropriately associated with the growth in support to competitive eligible telecommunications carriers (CETCs) through the application of the identical support rule.

The growth in the fund often elicits a strong reaction and that reaction is often a proposal to cap the fund at existing levels. This same capping proposal is found within

the Joint Board's Recommended Decision.¹ The problem, as we see it, is that there is no indication that the current funding level is appropriate. The formula that underlies the current funding level has been twice challenged in court and the court has found flaws with it.² Others have expressed concern that the current funding level is too large to be sustainable. Given the uncertainty of the reasonableness of the current support levels, we are troubled by the lack of cost estimates associated with new services (e.g., broadband) proposed to be added to the list of supported services. It is not clear to us that the proposed modified structure of the high-cost fund will permit the support of all the newly recommended services without an increase in the size of the fund.

The second concern that appears to drive much of the desire for universal service fund reform is concern about reported fraud and abuse within the system. As stated in the WYOCA's companion comments on the elimination of the identical support rule³, we too are concerned about whether the funds are being appropriately used by the recipients of the support. However, we note a clear absence in the Joint Board's recommendations of any new, specific action to address this concern – a concern that is supported by the October 3, 2007, report of the Commission's Inspector General.⁴ In response, the WYOCA suggests the Commission consider issuing guidance to the state regulators, the telecommunications industry, and other interested parties regarding the type of information that is desired and/or expected to be reviewed before providing assurance that the funds are being used for the purposes specified by Federal law. This suggestion is discussed further in our companion comments regarding the elimination of the identical support rule.

¹ See recommended Decision in WC Docket No. 05-337 and CC Docket 96-45, Released November 20, 1997.

² *Qwest Corporation v. FCC*, 258 F.3d 1191 (10th Cir. 2001) and *Qwest Communications v. FCC*, 398 F.3d 1222 (10th Cir. 2005).

³ See *Comments of the Wyoming Office of Consumer Advocate on the Elimination of the Identical Support Rule*, filed April 17, 2008, in WC Docket No. 05-337 and CC Docket No. 96-45.

⁴ See Inspector General's report, *The High Cost Program Initial Statistical Analysis of Data from the 2006/2007 Compliance Audits*, dated October 3, 2007.

The third concern that is frequently discussed relative to the topic of high-cost funding support is the issue of distribution and contribution inequities. The contribution concerns range from whether all of the appropriate industry players are contributing to the fund to whether or not the appropriate services are being assessed. The WYOCA does not offer an opinion on these issues at this time. Currently, our focus is directed to the distribution inequities and whether they are real or simply perceived (but without merit). While regulators tend to live in a world where perception is often reality, a few facts might help clarify what is really happening relative to differences in universal service fund distribution among states.

To examine the difference between states that tend to be net payers of total universal service support (e.g., states who contribute more than they receive back in support) and those who are net payees (e.g., states whose support exceeds their contributions), the WYOCA began with the 2006 data from the Federal-State Joint Board Monitoring Report. From the data on Table 1.12, we selected the five states that had the highest net contributions (the payer states) and the five states that received the most support in excess of their contributions (the payee states). The identified payer states are Florida, Maryland, New Jersey, New York and Pennsylvania. The payee states (territories) are Alaska, Kansas, Mississippi, Oklahoma, and Puerto Rico. We then looked at a five-year history of support payments to these ten states, with a particular focus on payments relative to high-cost support and schools and library support.

Some may question why we bring schools and libraries into the discussion. As we see it, the argument being made by others (particularly the payer states) is that the overall contribution assessment level is unsustainable. That assessment is used to fund all four parts of the universal service fund: high-cost, schools and libraries, low-income, and rural health. So, why not look at the largest pieces of that assessment? As it turns out, some of the net payers have received large support payments from the fund – just not the high-cost portion. This is shown in Chart One below.

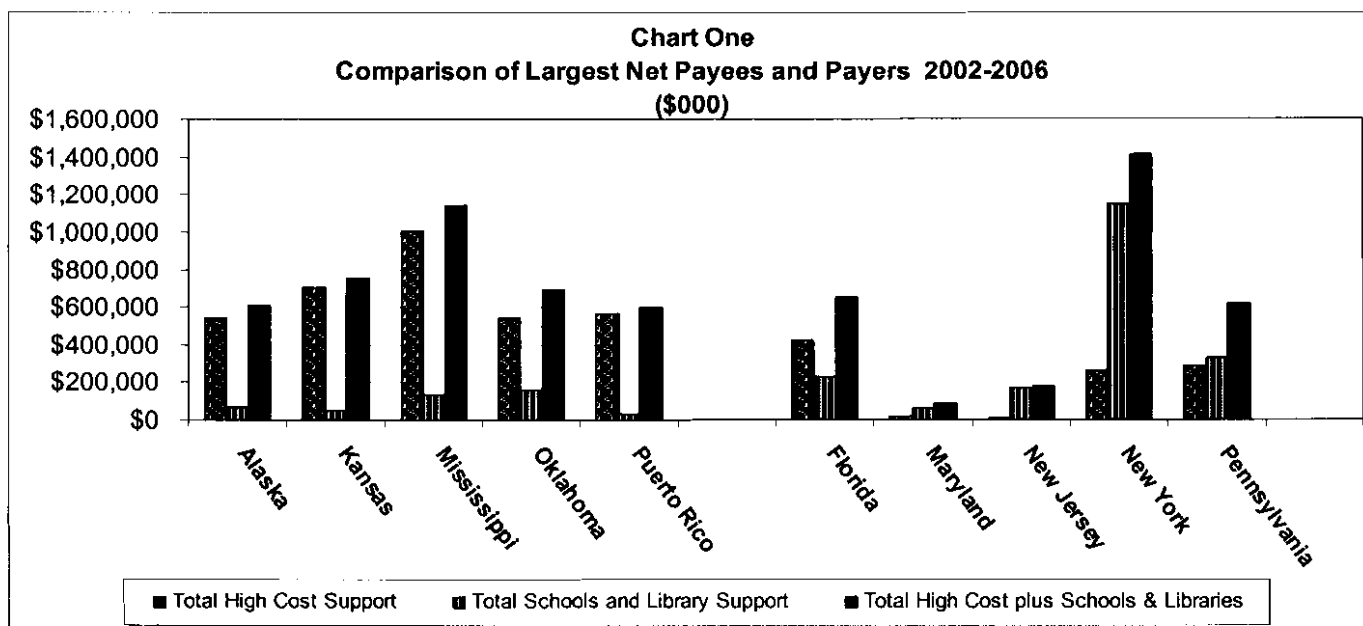
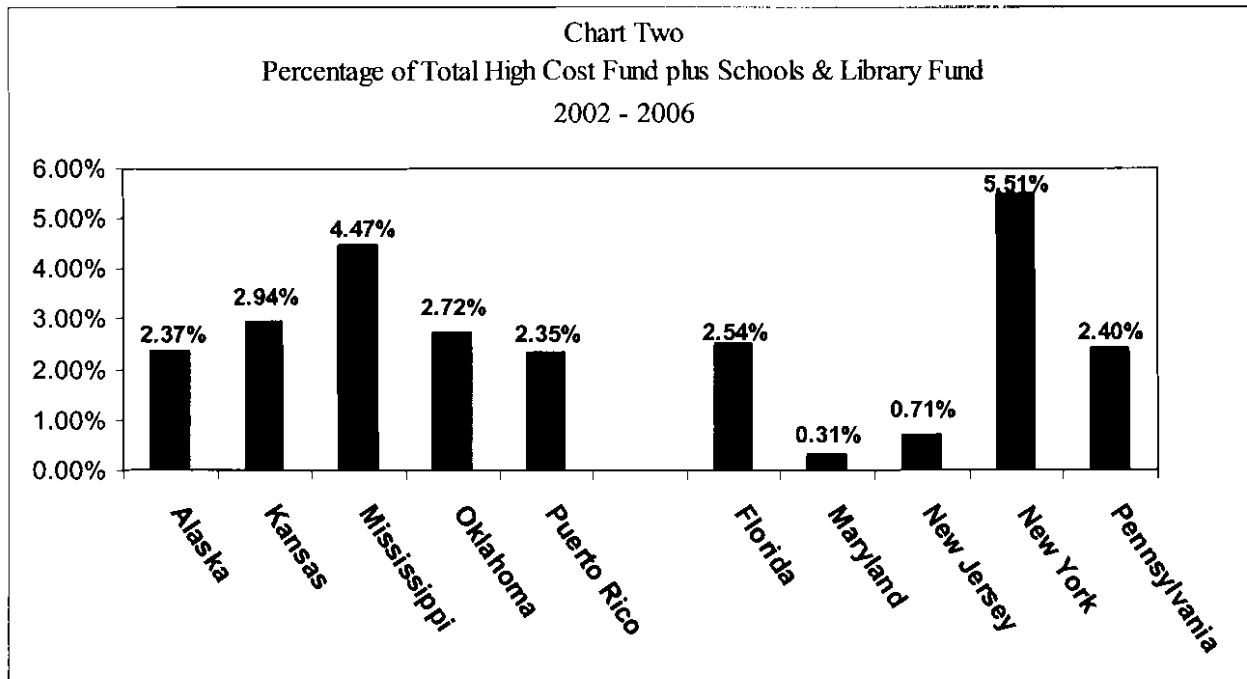


Chart One shows that New York actually received more funding from the combination of the high cost fund and the schools and libraries fund than did Mississippi – the state that is often touted as the poster child for what is wrong with the high-cost fund. Furthermore, Florida and Pennsylvania each received more in combined high-cost and schools and library funding over this five-year period than did Puerto Rico or Alaska. So, we wonder how it is that the high-cost fund has become such a target relative to sustainability and fund capping, when it is the totality of the fund that is causing the large contribution assessment factor. Is it because some of the net payer states could cap the high-cost fund without hurting themselves, while still receiving all of the benefits of the schools and libraries subsidies?

Chart Two is a second depiction of how the distribution inequities may be more of a myth than a reality. This chart depicts the same ten states discussed above, and shows the percentage of support that each state received from the combination of the high-cost and schools and libraries funds for the period of 2002 through 2006. This shows that New York received more than 5.5% of the total. When the amounts provided to the five payer states are summed, it totals nearly 11.5% compared to the 14.85% for the payee states – not a significant difference when looking at the impact on the overall assessment.



Our conclusion is that the high-cost fund should not take all of the criticism about out-of-control contribution levels. Individual states should not be singled out as placing a burden on the fund at the expense of other states. There are many states benefiting from the totality of universal service funding. This should be kept in mind as proposals for capping the high-cost fund are made based on the argument of the sustainability of the overall funding mechanism. It should also be kept in mind that various figures can be sliced and diced to any one party's advantage or disadvantage. As such, the WYOCA recommends that the revisions that come from this NPRM be based on principles and concepts, and not on what can be squeezed into some preconceived notion of what the overall funding level should be.

The Mobility Support Fund

The first of the three new funds that the Joint Board proposes is the Mobility Fund. This proposed fund is tasked with disseminating wireless voice services to unserved areas with most of the support provided as a subsidy for construction of facilities. The overall goal would be that all consumers should have access to at least one

carrier that provides a reliable signal. Secondly, funds might be available to provide continuing operating subsidies to carriers serving areas where service is essential but usage is so slight that an economic case cannot be made without operating support. The Joint Board recommends that the states be partners in administering the Mobility Fund. The money would come in the form of grants to the states who would then distribute the funds to specific projects. Support would be available to only one provider in any one geographic area. It is suggested that there be a transition period to move from the current funding mechanism to the new Mobility Fund with the fund ending up at a level of about \$1 billion per year. However, the Recommended Decision notes that, in the long run, the overall funding may decrease, as infrastructure deployment becomes more widespread.

As part of its recommendation to implement a Mobility Fund, the Joint Board made the case that mobility meets the criteria for becoming a supported service.⁵ The WYOCA does not object to this finding, and agrees that wireless services are desired and utilized by a significant portion of Americans. We also agree that mobility is a significant tool that can be beneficial to the advancement of public safety. We are confused, however, by the overarching implications of finding mobility to be a supported service. It appears that it may have been the intention of the Joint Board to separately define different sets of supported services for each of the three distinct proposed funds. However, that is not clear particularly in light of the current definition of eligible telecommunications carrier.

The discussion of eligible telecommunications carriers is found at 47 U.S.C. 214. Subsection (e)(1)(A) requires an eligible telecommunications carrier to "...offer the services that are supported by Federal universal service support mechanisms under 254(c)..." It appears that mobility would be a supported service subject to 254(c) and thus, some might argue that any carrier who wishes to obtain eligible telecommunications carrier status must provide mobility. Of course, this is ridiculous and clearly not the

⁵ See Paragraph 63 of the Recommended Decision, "Consistent with the preceding recommendations regarding broadband service, the Joint Board also recommends that mobility be added to the list of supported services."

intent of the Joint Board's recommendation. Under this interpretation, only wireless carriers could obtain ETC status. In light of this discussion and the current ETC definition, we ask the Commission to further clarify this matter.

The WYOCA appreciates that the Joint Board focused on new facilities and construction costs, rather than on-going operating costs, when recommending the new Mobility Fund. In our view, new towers and other related equipment will be more beneficial to customers and more easily verifiable as consistent with the purpose of high-cost funding. This is particularly true when such towers are used to serve populations without obvious business cases and subscribership levels that would allow for construction in the ordinary course of business. We agree with the recommendation that the funds should be first used for construction and only secondarily used to supplement on-going operation and maintenance costs.

We further appreciate the idea that this support would be able to be used for the construction of towers in the vicinity of public highways, and not just in more dense cities and towns. This would be particularly beneficial in Wyoming where there are more than a few unpopulated areas of the state with highways where no signal is available. We also find the use of these funds to benefit public safety consistent with Section 254(c)(1)(A) of the 1996 Act. However, the Commission should recognize that public safety may be one of the few instances where on-going operational costs, in addition to construction costs, will need a little bit of extra funding. Folks using wireless services along public highways rarely make enough calls or provide enough revenue to support the costs associated with towers in unpopulated areas – such as those locations that are traversed to travel from one town to another. Thus, it is reasonable to adopt the Joint Board's suggestion that in certain instances, operational expenses may warrant special support from the mobility fund. However, we hope that this will be the exceptional use of the Mobility Fund and not the norm. We request that the Commission, when developing any written guidelines or rules on this issue, adopt the position that the Mobility Funds should primarily be used for construction. The guidelines should also be written in such a way to allow enough flexibility for some operational expense support in

certain exceptional cases based on the public interest and public safety of the general population.

The Broadband Fund

The second of the three proposed funds is the Broadband Fund. This fund would be primarily tasked with facilitating construction of facilities for new broadband services to unserved areas. The fund might also be used to enhance broadband in areas with substandard service. Finally, there could be funding provided for continuing operating subsidies to broadband internet providers serving areas where low customer density would suggest that a plausible economic case cannot be made, even after a substantial construction subsidy. As with the Mobility Fund, the funding would be in the form of a construction grant which would be allocated to the states who would then allocate the money to the providers. Duplicate support would be avoided by only providing funding to one provider in any one geographic area. It is suggested that the funding for broadband begin at about \$300 million per year.

Some of the WYOCA's concerns about the Broadband Fund are the same as those discussed above for the Mobility Fund. For example, we have a similar confusion about including broadband as a supported service as we had for including mobility as a supported service.⁶ How does this fit with the statutory language of 47 U.S.C. 214 and 254(c)? We seek similar clarification on this issue relative to any finding that broadband is a service that should be supported by universal service funds. Would all eligible telecommunications carriers be required to provide broadband (as opposed to the current requirement for broadband capable lines) whether or not they were one of the lucky ones whose project would be partially financed by the state-administered grants?

⁶ The Joint Board recommended at paragraph 58 of the Recommended Decision that broadband be declared a supported service: "We conclude that broadband Internet service satisfies the statutory criteria for inclusion."

We further seek clarification on whether broadband fits the definition of supported services pursuant to 47 U.S.C. 254(c). The WYOCA does not object to declaring broadband a supported service, as long as it does not have a detrimental impact on the provision of voice service and as long as appropriate funding is available to begin to close the gap between the haves and the have-nots relative to advanced services. In its support for why broadband should be declared a supported service, the Joint Board made appropriate and reasonable arguments relative to its widespread use and its general public interest benefits. However, there is one obscure definitional issue that remains troubling to the WYOCA and we request a clarification from the Commission.

Section 254(c) appears to state that universal service relates to telecommunications services. The definitions found at Section 3 of the 1996 Act distinguish between *telecommunications* and *telecommunications services*. In a Report and Order issued August 5, 2005⁷, the Commission found that broadband internet was either an information service or found it to be telecommunications, rather than a telecommunications service. We seek clarification on whether this disqualifies broadband internet from then being a supported telecommunications service under Section 254(c) of the 1996 Act.

This brings us to the question of affordability and whether the Joint Board's proposal will actually widen the chasm between the haves and the have-nots, rather than narrowing it. If the Commission truly wants to support universal broadband at advanced

⁷ *In the Matters of: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (CC Docket No. 02-33); *Universal Service Obligations of Broadband Providers*; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* (CC Docket No. 01-337); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements* (CC Docket Nos. 95-20, 98-10); *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises*; *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises* (WC Docket No. 04-242); and *Consumer Protection in the Broadband Era* (WC Docket No. 05-271).

service speeds, we question whether the recommended level of funding of \$300 million per year is enough to accomplish that goal. Is it enough to do more than a project or two in each state each year? If not, where does that leave those citizens who remain without broadband internet? These unserved or underserved citizens will continue to pay the tab for the expanded universal service that includes broadband, but will be required to continue to wait for broadband services for themselves. We urge the Commission to strongly consider whether the time is right to include broadband as a supported service. Can telephone subscribers afford this added service?

If the Commission does decide to include broadband as a service supported by the universal service fund, then we urge the Commission to expeditiously develop guidelines or rules relative to the quality and speed of the broadband projects that qualify for support. Without such rules there is likely to be a great deal of inconsistency regarding the types of projects standing in line for broadband support. There should be a reasonable minimum national threshold of quality and speed before customers' funds are used to support the national buildout of broadband services.

The Provider-of-Last-Resort Fund

The Provider-of-Last-Resort Fund is proposed to support wireline carriers who provide this function. The Joint Board did not propose specifics relative to this fund but only provided general thoughts relative to how it would work. It is suggested that the fund begin with the sum of all existing incumbent local exchange carrier support mechanisms with a few specific exceptions. Rather than outline a specific proposal for this fund, the Joint Board leaves that to the Commission. However, the Joint Board did provide a list of suggested issues to consider when developing the details for this wireline fund. The items that the Joint Board suggests for consideration include: (1) a unified rural and non-rural mechanism, (2) modification of current freezes relative to sales of exchanges, (3) treatment of line losses due to competition, (4) the fact that today different costs are supported for rural carriers compared to those for non-rural carriers; (5) deaveraging of service territories for purposes of computing and/or distributing support,

(6) inclusion of a potential rates test as well as consideration of a carrier's costs, (7) limiting support for operating expenses, and (8) targeting support to only one provider in each geographic area.

The WYOCA appreciates the desire of the Joint Board and the Commission to see advanced services and wireless services available ubiquitously throughout the United States and its territories. The thought of being part of the solution of how to make that happen is exciting and something new compared to the same old discussions about the costs of voice services. Thus, support for wireless and broadband services has clearly taken center stage in the Recommended Decision. This is troubling, as the meat of the issue of how to reform the existing, broken system has been left untouched. Some will argue that the system will be fixed with the simple implementation of caps on the fund. We disagree. Some will argue that the system will be fixed as soon as broadband and mobility are included as supported services. We disagree. There is a fundamental set of issues that must be addressed to assure that voice services at today's rates and quality are not diminished. Our hope is that addressing these issues may even improve the provision of voice services and not simply maintain the status quo. But, if nothing is done to address the fundamental issues related to reform of the high-cost support system for wireline carriers, we fear that universal service will be neither preserved nor advanced.⁸

The Recommended Decision, at paragraph 33, gives passing reference to the *Qwest II* remand⁹ from the court for non-rural carriers and, at paragraph 4, acknowledges the need to derive a plan to replace the support structure for rural carriers that was implemented as a result of the work of the Rural Task Force. But the bulk of the Recommended Decision is spent on other aspects of universal service reform. It does not address, head-on, how a capped fund with newly added supported services will keep rates affordable and reasonably comparable¹⁰ for customers in rural, high-cost areas.

⁸ Section 254(b)(5) of the Telecommunications Act of 1996.

⁹ *Qwest Corp. v. FCC*, 398 F.3d 1222(10th Cir. 2005)

¹⁰ Section 254(b)(3) of the Telecommunications Act of 1996

It is difficult to see how this new three-fund structure can be implemented in a comprehensive manner when one leg of the three-legged plan has not yet been developed. Without a plan for the Provider-of-Last-Resort funding, how will the Commission be able to determine if the overall structure is reasonable and accomplishes the national goals and priorities for the provision of telecommunications services?

While the Joint Board was not able to provide a comprehensive outline of its vision for the Provider-of-Last-Resort Fund, it did provide a set of issues that offer a good starting point for a debate on the revisions that might be reasonable to examine relative to high-cost support for wireline carriers. These issues, listed above, include questions such as should the same set of costs be supported for rural and non-rural companies? Should there be a distinction between rural and non-rural providers in the future? Should support be computed and distributed on a more disaggregated level than it is currently? As the Joint Board has already put some thought into defining the issues to be addressed, it might be reasonable to allow the Joint Board an additional opportunity to formulate some proposals in response to its identified issues. We are concerned, however, that the step of seeking further proposals from the Joint Board could result in unreasonably long delays in a reform process that has already been unbearably long. Whether the Commission refers this matter back to the Joint Board or decides to take on the issue of reforming the most significant remaining piece of the high-cost fund itself, time is of the essence.

We agree with the Joint Board the funding of competition should not be the intent of universal service funding.¹¹ Instead the intent is to fund affordable, quality service to customers while implementing policies that do not impede competition. Some may argue that without support for alternative carriers, the benefits of competition will be lost to rural and high-cost carriers. It is not apparent that this is the case, as many carriers have established and continued operations without support from the universal service fund. Wyoming examples include Verizon Wireless and Bresnan Communications. Based

¹¹ Recommended Decision, Paragraph 35.

upon number of lines, Bresnan is the second largest wireline telecommunications provider in the state.

Finally, the WYOCA wishes to remind the Commission about the rural customers in sparsely populated areas who rely upon high-cost support to keep rates at affordable, if not currently comparable, levels. Many of these customers want advanced, high-speed services. Others only wish to have dial tone on a consistent basis. Neither of these are likely to happen without a specific, sufficient, predictable level of support.

State Matching Funds

The Recommended Decision suggests that the Mobility Funds and Broadband Funds could be stretched further if supplemented with state matching funds. The Joint Board recommends that the Commission adopt policies that encourage state matching funds. It is further suggested that one of the ways that states could be encouraged to provide these matching funds is to provide a base level of funding for all states but supplemental funds for states that provide matching. This is analogized to the low-income funding where a base federal discount is provided for all qualified low-income customers, but the level of the federal discount is greater if there is also a state discount amount provided. While the Joint Board provides some examples of the types of state matching that may be acceptable, including governmental or private matching funds, carrier or customer contributions, or tax contributions, in the end it recommends that federal guidelines be developed to address when and how supplemental support should be provided.

If the three fund proposal, or some variation thereof, is ultimately adopted by the Commission, the WYOCA is not opposed to the concept of state matching funds. It is consistent with the federal/state partnership that we have envisioned for universal service since the issuance of the Commission's first universal service order in May 1997. This is also consistent with Section 254(i) of the Telecommunications Act of 1996 which

envisions that customers will be protected from unreasonable rates through that federal/state partnership.¹²

Yet, you must forgive us if we are somewhat skeptical of how this partnership will be enacted. Based on the May 8, 1997 Universal Service order and the language of the 1996 Act, the Wyoming Public Service Commission and telecommunications industry in Wyoming moved forward with all of the actions that seemed reasonable to prepare for the brave new world of competition. We restructured rates, replaced implicit subsidies with explicit subsidies, and established price floors. Then we waited for the promised help from the federal universal service fund in order to accomplish the national goal of affordable rates and comparable rates and service. We waited. On December 21, 2004, we submitted a request for supplemental funding pursuant to the Commission's direction.¹³ We still wait.

We agree with the Joint Board that the Commission should establish federal guidelines to direct the process of utilizing state matching funds for supplement federal support. We do not envision this to be an easy task, however, as there are many factors to consider when determining whether the state has brought a sufficient amount of support to the project. Certainly, the list of factors to consider should include the obvious ones listed in the Recommended Decision: customer surcharges, private contributions, payments from state coffers, and more. But, would it be considered a state contribution if customers paid a price for the service that was substantially higher than the national average? We ask the Commission to ponder whether higher rates paid by customers are substantially different from the concept of a customer surcharge that is listed as an

¹² Section 254(i) states: "The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable."

¹³ *Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier*, filed December 21, 2004 pursuant to the Commission's *Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order*, dated October 27, 2003.

example of a state match in the Recommended Decision.¹⁴ Should a state be required to have its customers pay substantially higher rates and a separately imposed surcharge to meet state matching when some other state may qualify with lower rates and the same surcharge? Would the answer be different if the state could show that the higher rate was imposed to make the customer's line broadband compatible, and that without the increased rate, the customer would be unable to obtain high-speed advanced services?

There are many factors that should be considered when implementing the federal guidelines for state matching. Some of these issues may be similar to the *early implementation* issues that have come before the Commission in other arenas. If a state has already put some funding into its system (such as anchor tenant improvements to the network that then provides benefits to a broader array of users) should it have to put in the same amount of matching funds as a state that has not previously made such improvements? Finally, we ask that the Commission consider some flexibility in its guidelines where it can rule on special or unique circumstances. All too often, rules are put into place and they become obsolete with the blink of an eye. Creativity should be encouraged when it comes to partnerships to improve networks and expand the availability of advanced services. Rigidity often stifles that desired creativity.

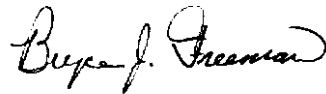
Conclusion

The WYOCA is grateful to the Joint Board for issuing its Recommended Decision and squarely placing the issues of universal service reform back on the table. We appreciate the fresh thoughts and unique approach that the Joint Board has offered for debate. It is refreshing to have new ideas for consideration. We particularly appreciate that the Recommended Decision tends to focus on infrastructure and new construction, while recognizing that some areas will be unable to sustain on-going operations without a little help. However, now is the time to build on the statement of Commissioner Landis wherein he expresses his appreciation for those who have moved away from the

¹⁴ See Paragraph 52 of the Recommended Decision.

entitlement mentality.¹⁵ Entitlements have no place in the development of universal service policies. It is a national goal to provide affordable, quality telecommunications services to all citizens throughout our nation. All reforms should center around this national policy.

Respectfully submitted on the 17th of April, 2008.



Bryce J. Freeman, Administrator
Wyoming Office of Consumer Advocate
2515 Warren Avenue, Suite 304
Cheyenne, WY 82002
Telephone (307) 777-5742
FAX (307) 777-5748
bfreem@state.wy.us

¹⁵ Statement of Commissioner Larry S. Landis, *In the Matter of High-Cost Universal Support*, in WC Docket No. 05-337 and CC Docket No. 96-45, "While it is to be expected that the input of stakeholders will reflect their respective interests, for the most part they were thoughtful, productive, constructive and even imaginative, as opposed to reflecting an entitlement mentality which has at times clouded this ongoing debate."

Reverse Auction Comments of the Wyoming Office of Consumer Advocate

Separately Filed

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**COMMENTS OF THE WYOMING OFFICE OF CONSUMER ADVOCATE
ON THE USE OF REVERSE AUCTIONS TO DETERMINE THE AMOUNT OF
HIGH-COST UNIVERSAL SERVICE SUPPORT**

Introduction

On January 29, 2008, the Federal Communications Commission (Commission) released a Notice of Proposed Rulemaking (NPRM) seeking comment on the merits of using reverse auctions, also referred to as competitive bidding, to determine the amount of high-cost universal service support provided to eligible telecommunications carriers (ETCs) serving rural, insular, and high-cost areas. The Commission first seeks comment on the general concept of using reverse auctions relative to High-Cost Support. In seeking a discussion about reverse auctions, and particularly the advantages of competitive bidding, the Commission notes the three distinct proposals that have been made: (1) CTIA's proposal for a "winner-gets-more" reverse auction, (2) Verizon's proposal for a limited trial to sort out a winning bidder in areas in which there are currently multiple wireless ETCs, and (3) Alltel's proposal for a pilot program to promote broadband deployment in unserved or underserved rural areas.

Beyond the initial invitation for comment on the concept of reverse auctions, the Commission raises a number of quite specific questions relative to the implementation of competitive bidding. The list of issues includes questions about eligibility requirements for bidders, multiple versus single winners in any one area, the method of distribution of any support provided as the result of an auction process, the appropriate geographic area

for any individual auction, maximum support levels to be imposed, obligations that should be mandated for both bidders and winners of the bidding process, and the design of the auction.

The Wyoming Office of Consumer Advocate (WYOCA) has a number of concerns about reverse auctions that leads it to conclude that the time is not right to implement reverse auctions as the overarching framework for currently needed high-cost funding reform. Instead, we suggest that competitive bidding might better be used as a tool within a broader framework, if it is to be used at all. The broader framework, as noted in the WYOCA companion comments on broader universal service funding reform, should look at the appropriate, necessary funding to achieve the stated national goals for telecommunications – whether those goals are to focus on voice or to expand into broadband. The reform must focus on a wider set of goals than simply finding ways to reshuffle the existing level of funding. It must address maintaining and expanding modern telecommunications service throughout the nation at rates that are just and reasonable for both urban and rural customers.

The Concept of Reverse Auctions

In its Notice of Proposed Rulemaking, the Commission suggests that the use of competitive bidding may be compelling since it is a market-based approach to determining the distribution and need for universal service. We agree that in theory, the competitive aspects of this market-based approach to determining the level and distribution of high-cost support has some appeal. For example, the market would ideally determine the appropriate level of support that is needed, putting an end to the on-going debate of whether enough funding is being provided or whether the funding is excessive and wasteful. Additionally, the market-based approach, in theory, would be competitively neutral in that any form of technology could win the bid, as long the carrier

of that technology were willing and able to meet each of the qualifications set out in the bidding standards¹.

Unfortunately, the WYOCA does not see these theoretical benefits actually coming to fruition, as the reverse auction discussions seem to focus on the number and type of restrictions and limitations that should be placed on any winning bids. For example, the benefit of actually knowing what the correct amount of support is for any particular area could be completely wiped out if there were caps put on the level of support to be provided in any one geographic area. It is possible that everyone would bid at the level of the cap – whether that level of funding was necessary or not. It is also possible that the cap would not be enough funding for that particular area, either resulting in no bids or bids where there was no intention of providing comparable service. In the latter case, the bidder may be looking at the situation of taking the funding provided, and then taking whatever shortcuts are necessary to provide service within the capped level of funding. Thus, caps could completely wipe out one of the major benefits that could be derived from the use of reverse auctions.

Furthermore, the realities of today's market may not allow for the benefit of competitive and technological neutrality within the context of a reverse auction. Today's providers often rely on each other's networks to originate, complete, and transport calls. If some pieces of those networks were to be eliminated (or diminished in quality) because of the lack of support, it only makes sense that other providers would have difficulty providing universal service in an area without having to recreate much of the other provider's lost network. And, it is hard to imagine how that lost piece of the overall network could be recreated at a capped level of current support amounts.

Today, carriers seeking eligible telecommunications carrier (ETC) status are required to meet a specified list of requirements in order to be granted the right to draw from the universal service support fund. These obligations are stated at 47 CFR 54.201

¹ We note, however, that the 1996 Act contains no requirement that universal service policies should promote competition or that funding mechanisms be technology-neutral. This is a point made by NASUCA with which we agree.

and 202. However, these requirements are not the same as carrier of last resort obligations and can be satisfied with the use of another carrier's facilities. The mere fact that a carrier is an ETC does not mean that such carrier is able and willing to be the sole carrier in an area without assistance from other existing carriers. If the Commission were to move forward with the implementation of reverse auctions, it should assure that bidders are truly qualified to provide service in an area at the stated bid price. This will require thorough oversight by the regulator (whether federal or state or both).

It also appears that the use of reverse auctions could change the entire regulatory regime relative to telecommunications. Over the past ten or more years, the regulation of telecommunications has become very light-handed, in response to the increasing competitiveness of the market. This current regulatory structure, as well as technological advancements, have allowed an increasing competitiveness in the telecommunications market and the opportunity for customer choice of technologies in all but many of the most remote and sparse portions of the nation. The WYOCA anticipates that regulation may need to become more heavy-handed under a regulatory scheme that only allows for one provider to receive high-cost support in a geographic area in order to ensure compliance with the reverse auction requirements. We are particularly concerned about retail pricing regulation under a reverse auction environment where there would likely only be one supported carrier in each geographic area. Today, there is only minimal retail pricing regulation left by most states -- often because policy makers have determined that there is no need to supplement the constraints of the market with strict regulation. General regulatory oversight is usually deemed to be enough, with many policy makers not even seeing the need for general oversight. But, if the constraints of the competitive market -- including pricing constraints -- have been removed due to the unsustainability of service without high-cost support to multiple carriers, it seems logical to assume that regulation will have to step in where the competitive market no longer assures just and reasonable pricing. This new regulatory regime would be a complete reversal of the recent direction of encouraging competition in lieu of regulation. The WYOCA hopes that there might be other means of addressing the restructuring of

universal service support without imposing additional heavy regulatory burdens on industry and customers alike.

Single versus Multiple Winners

The Commission seeks comment on whether each reverse auction should have multiple winners or a single winner for each geographic area. Clearly, the answer to that question depends on one's prioritization of the issues surrounding universal service.

Many interested parties, such as NASUCA, have advocated that each area have one winner such that the size of the fund will be more limited and thus, the fund will likely remain more sustainable further into the future. We agree that if sustainability or capping of the fund is a priority for the Commission, allow only one winner per area. However, we ask that the Commission note our above-stated concerns about the potential of only one supported provider having an impact on the integrated network. If, for example, a wireless carrier were to be the winning bidder, such that the incumbent wireline provider no longer received support and this impacted the sustainability of the wireline network, the fund would be sustainable at a lower cost, but at what cost of service quality, service options, and price to the customer?

In the alternative, we are intrigued by the CTIA proposal. This proposal has been termed a "winner-gets-more" proposal where the lowest bidder would receive the most funding for the designated area, but the other qualified providers in the area would receive some lesser amount of funding. Allowing multiple winners might eliminate the concern about the loss of some important network participants, but there is a strong likelihood that the fund size would not decrease under this proposal. Additionally, there is some risk that without strong regulatory oversight, there would be an opportunity for gaming the bidding process – such that a bidder could bid zero for an area whether or not there was a real intent to serve that particular market in a meaningful way – simply to keep others from receiving appropriate and potentially necessary support to provide quality service.

The CTIA proposal is also intriguing from the standpoint of keeping alternative providers in the market. The Telecommunications Act of 1996 does not require identical support or other incentives to entice or keep alternative carriers in a market. The WYOCA supports neither the identical support rule nor incentives for competitors. But, a competitive market is developing and it would be a shame to do anything that would encourage competitors to leave the market – particularly if the provider leaving was the incumbent who had lost the reverse auction bid. We worry that a single winner reverse auction might do this very thing.

Geographic Areas

The Commission seeks comment on the appropriate geographic area for reverse auctions. At paragraph 19 of the NRPM, the Commission cites some concern that using the geographic service area of any particular carrier might provide an advantage to one provider over another. The Commission also seeks input on whether smaller geographic areas should be used in any competitive bidding process that is implemented.

The WYOCA is a proponent of smaller, disaggregated service areas for determining support levels and has been for a number of years. In fact, our understanding of the intention of the Commission -- ever since the early days of the modern incarnation of the high-cost fund -- was that there would be disaggregation of carriers' service areas for the purpose of providing support. This is stated in the Commission's Universal Service Report and Order dated May 8, 1997, at paragraph 192:

We agree with the Joint Board's analysis and conclusion that it would be consistent with the Act for the Commission to base the actual level of universal service support that carriers receive on the cost of providing service within sub-units of a state-defined service area, such as a wire center or a census block group (CBG). [Footnote omitted.]

Disaggregation of support made sense then and it makes sense now. Smaller geographic areas allow for a more targeted approach to support and allow more of the

funding to reach the truly higher cost areas. This is true whether or not reverse auctions are the method of funding that are adopted for high cost support.

Reserve Prices

The WYOCA is concerned about the concept of a reserve price as discussed in the NPRM. As described in paragraph 36 of the NPRM, the reserve price would be a “maximum subsidy level that participants in the auction would be allowed to place as a bid.” Our first concern is that all of the bids would congregate around that reserve price, such that it would be impossible to know whether or not the unrestricted price would actually be substantially higher or lower. If a person is negotiating and indicates that he/she will pay \$x but not a penny more, why would the counterparty charge a penny less? The analogy applies here. The reserve price becomes a target price.

Our second concern is that the reserve price is nothing more than a cap. As discussed elsewhere in these comments, if the level of subsidy is capped, it is impossible to know the true amount of support that carriers believe they need. It is therefore impossible to know whether the level of support being provided is reasonable or adequate to provide services that are reasonably comparable in price and quality throughout the nation.

As described in the NPRM and the reverse auction proposals, one of the positive qualities of competitive bidding is to allow the market to “allow direct market signals to be used as a supplement to, and possible replacement of, cost estimates made from either historical cost accounting data or forward-looking cost models.”² But, as soon as there are constraints put on the level of support, the market signals are no longer visible and have been potentially altered so as to become artificial. This one constraint eliminates one of the primary benefits of the use of a reverse auction.

² Paragraph 11 of the NPRM.

We are also concerned about capping the competitive bids at current support levels when the issues of *affordability, sufficiency, and reasonable comparability*, have been challenged and rejected by the courts twice³. These levels that are proposed to be used are based on the same formulas and definitions rejected by the courts. There is no reason to believe that the outcome would be any different if a challenge were again presented to the use of these numbers.

Broadband Reverse Auction Pilot Program

The NPRM seeks comment on whether reverse auctions should be tested with a pilot program for the distribution of either high-cost support or broadband internet access support. The WYOCA suggests that given the untested nature of reverse auctions relative to universal service funding, and given the importance of assuring that high-quality services are maintained throughout the nation at affordable prices, it would be risky and inappropriate to jump into reverse auctions with both feet without a trial run. Furthermore, such a trial would best be focused on areas currently unserved or underserved, since these areas have more to gain than to lose with such a trial.

We are, however, concerned about introducing broadband support through the use of a reverse auction trial. There are still areas of the nation without adequate, affordable voice services. If the Commission insists that it would like to test the use of competitive bidding in the universal service setting, then it would be best used to complete the provision of traditional voice services throughout the nation before expanding the chasm of haves and have-nots with broadband services. Furthermore, we are concerned about the introduction of broadband services into the universal service support arena without a clear direction of what is expected of all eligible telecommunications providers relative to broadband.

³ *Qwest Corporation v. FCC*, 258 F.3d 1191 (10th Cir. 2001) and *Qwest Communications v. FCC*, 398 F.3d 1222 (10th Cir. 2005).

Section 254 (c) of the Telecommunications Act of 1996 requires the Commission to define the services that are to be supported under the universal service support mechanisms. Currently, broadband is not a supported service. Eligible telecommunications carriers are currently required to provision their lines and networks in such a way as to permit the carriage of broadband services without interference. But, the offering of broadband service itself (including all of the head-in equipment that is necessary) is not currently a supported service. Therefore, the addition of broadband service itself would be a significant change to the list of services supported by universal service funding. If the Commission chooses to make this change, it should do so in a clear and understandable manner for all eligible telecommunications carriers. This is not, however, what is proposed with the suggestion of a broadband reverse auction trial. The broadband trial that is inferred in the NPRM (and the trial suggested by Alltel) would sneak the nose of the camel under the tent and begin to support small portions of broadband in some areas without a clear and distinct finding that broadband is now a service that is necessary to the wellbeing of the public⁴. If the Commission is to incorporate broadband into universal service, it should do so in a broad, comprehensive way where all unserved or underserved areas have the opportunity to receive service comparable to the majority of the country. No, broadband should not sneak into universal service through a trial of competitive bidding. Broadband should be incorporated as a significant, boldly announced, major reform of the universal service fund, if it is to be incorporated at all. However, that then raises the question, *Can the country afford universal broadband service?* While we don't know the answer to this question, we are certain that we will not be able to have universal broadband at the current level of funding that many propose to cap. Capping the fund at current levels and providing universal broadband service are fundamentally inconsistent⁵.

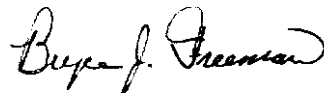
⁴ The process for determining changes to supported services is found at Section 254(c) of the Telecommunications Act of 1996.

⁵ We agree with Commissioner *Copps' Statement of Approving in Part, Concurring in Part* with the Joint Board proposal released November 20, 2007: "By recommending a cap of the fund at current levels, the Board cripples the ability of USF to support broadband in a credible manner."

Conclusion

The time is not right to implement reverse auctions as the overarching framework for currently needed high-cost funding reform. Overarching reform is needed but it should not be built around the concept of reverse auctions. If reverse auctions are to be implemented, they should be used to complete the provisioning of voice services in unserved and underserved areas of our nation. As to broadband, if it is to become a supported service, it should be introduced through the Commission's docket on comprehensive high-cost reform, and not through the use of a reverse auction.

Respectfully submitted on the 17th of April, 2008.



Bryce J. Freeman, Administrator
Wyoming Office of Consumer Advocate
2515 Warren Avenue, Suite 304
Cheyenne, WY 82002
Telephone (307) 777-5742
FAX (307) 777-5748
bfreem@state.wy.us

Identical Support Rule Comments of the Wyoming Office of Consumer Advocate

Separately Filed

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
High-Cost Universal Service Support)	WC Docket No. 05-337
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45

**COMMENTS OF THE WYOMING OFFICE OF CONSUMER ADVOCATE
ON THE ELIMINATION OF THE IDENTICAL SUPPORT RULE**

Submitted April 17, 2008

Introduction

On January 29, 2008, the Federal Communications Commission (Commission) released a Notice of Proposed Rulemaking (NPRM) seeking comment on whether to eliminate the current *identical support* rule (or equal support rule) which provides the same per-line support to a competitive eligible telecommunications carrier (CETC) as is received by an incumbent local exchange carrier (ILEC). The NPRM also seeks comment on the support method that should replace the identical support rule, should it be eliminated.

The Commission reached two essential tentative conclusions which it expressed in the NPRM. The Commission first tentatively concluded that the identical support rule should be eliminated, as the amount of support received by the CETC bears no relationship to the amount of money that the CETC has invested in rural and other high-cost areas. The rapid rate of growth in the high-cost fund due to support payments to CETCs based on the identical support rule is also a concern noted in the NPRM.

The Commission further concludes, on a tentative basis, that the identical support rule should be replaced with a support mechanism that is based on the CETC's own costs of providing the supported services. It opines that the CETC's own costs will better

reflect its real investment in high-cost areas, and that using this method will provide a greater incentive for investments in the high-cost areas.

The Wyoming Office of Consumer Advocate (WYOCA) agrees with the Commission's tentative conclusion that the identical support rule should be eliminated. However, we disagree that a support method based on the CETC's own costs is the best replacement. Instead, we support a transition to a new, comprehensive system of reform that is not grounded in formulaic inputs that are hard to verify. The transition process and the new method of support for CETCs should be tied directly to the overall comprehensive reform of high-cost support which the Commission is to decide in a companion NPRM.

Discussion

In 1997, the Commission decided that *competitive neutrality* should be added to the list of universal service principles and that this should include technological neutrality.¹ In adding this principle, the Commission did not intend to choose between competition and universal service and anticipated that it was creating a mechanism "that will sustain universal service as competition emerges."² However, in adding competitive neutrality to the list of principles delineated by Congress in Section 254 of the Telecommunications Act of 1996, it was clearly not the Commission's intent to show the competitive neutrality principles precedence over the others. This is clear in paragraph 52 of the Commission's Universal Service Report and Order of May 8, 1997:

We agree with the Joint Board's recommendation that our universal service policies should strike a fair and reasonable balance among all of the principles identified in section 254(b) and the additional principle of competitive neutrality to preserve and advance universal service. Consistent with the recommendations of the Joint Board, we find that promotion of any one goal or principle should be tempered by a commitment to ensuring the advancement of each of the principles enumerated above. [Emphasis added.]

¹ CC Docket No. 96-45, Report and Order released May 8, 1997, paragraph 49.

² Id. paragraph 50.

Yet, the tempering of one principle for the survival of another is rarely discussed in conversations about competitive neutrality and support for CETCs. The focus is usually simply on the fact that the Commission implemented the identical support rule – end of story. There is no balance as to the affordability of rates or the predictability or sufficiency of the high-cost fund. We applaud the Commission for finally seeking some balance in the process.

Yet, we are not asking the Commission to ignore its finding that competitive and technological neutrality is important. We simply urge the Commission to find another means of implementing competitive fairness. We are not suggesting that the only providers who should receive support are the ILECs. Instead, we are suggesting that the structure of the support for all providers, including the CLECs, be reexamined and restructured.

As to the replacement of the identical support rule, the Commission should look at this on a comprehensive basis with other contemplated reforms of the high-cost support system. It should not be piecemealed separately from the rest of the universal service reform being concurrently considered by the Commission.³ The WYOCA does not see the creation of cost-based support for CETCs (who are primarily wireless carriers) as being the best step in an overall plan of comprehensive reform.

From very early on, unique regulatory treatment has been given to wireless carriers. States have generally been limited in or prohibited from regulation of wireless carriers. They are not required by the Commission to keep their records in any prescribed uniform manner. Their costs or rates are not examined or overseen by regulators. So, to now suggest a cost-based support system would be starting at ground zero. A uniform system of accounts would need to be established to provide for comparability of costs among carriers and to assure that only the proper costs are included in the proper

³ We agree with Commissioner Copps in his statement on the identical support rule, “I hope the FCC will deal with these recommendations expeditiously and comprehensively. This is no place for piecemeal actions.”

categories that are subject to support. Studies would have to be done to separate the expenses and assets for supported services versus non-supported services. A system of verification of these costs would need to be established. It would be the equivalent of starting a mini-regulatory system for wireless carriers in an era where there is little regulation of wireline carriers. It makes no sense in today's regulatory environment. It would be a distraction from the real reform of universal service that should be the focus of the pending NPRMs.

We do agree, however, with the concept of providing support to the CETCs in a manner that more directly promotes investment and quality services in high-cost, low-density areas of the nation. We would also like to see support provided in a manner for which a direct benefit is more easily identified. The Joint Board's comprehensive proposal where wireless CETCs receive support for more towers and equipment in unserved and underserved areas fits the bill. A direct benefit to end users can be seen when an extra tower is placed in service such that wireless customers don't have to drive to the top of the hill to get wireless service. This is opposed to the current situation, where the use of the high-cost funding is often more difficult to trace. In today's market, it is becoming more and more difficult to determine whether the high-cost funding is replacing funds that previously came from the corporate budget, or whether it is supplementing that budget.

This brings us to paragraph 26 of the NPRM wherein the Commission seeks comment on the sufficiency of the Commission's existing use of certifications with respect to CETCs. The Commission reports that some parties are concerned that wireless CETCs are not using their universal service support to promote universal service goals. The WYOCA has this same concern. Although the Commission did an excellent job of delineating a list of items that are appropriate for inclusion in CETC certifications, the same type of checklist or suggested reporting does not exist for the October 1st process in which regulators annually certify the proper use of the funds. We ask the Commission to consider issuing guidance to the state regulators, the telecommunications industry, and other interested parties regarding the type of information that is desired and/or expected

to be reviewed before providing assurance that the funds are being used for the purposes specified by Federal law. While we are not suggesting that the Commission mandate the states' review or certification process, we have seen states incorporate the earlier ETC certification recommendations into their processes – thereby strengthening those processes. We suspect the same would occur with suggestions to the states and industry on what items comprise proper use of the funds and how that is best shown.

While the above suggestion on additional guidance from the Commission may seem a bit out of character with this proceeding, we don't see it that way. Much of the reform that is being proposed in this and the two companion NPRMs (on reverse auctions and comprehensive reform) is premised on the need to control the size of the fund. Rather than only focusing on caps and reporting and other similar fund outflow reforms, we suggest a focus on the use of the money. The Commission's Office of Inspector General issued a report on October 3, 2007,⁴ concluding that the payments made pursuant to the high-cost funding mechanism exceed the allowed erroneous payment rate as defined in the Improper Payments Information Act of 2002. While this high level of erroneous payment is due primarily to poor reporting and recordkeeping, this should not be accepted as a routine practice. As stated on pages 27 – 28 of the Inspector General's Report:

...The problem of the lack of documentation is disturbing not only because it complicates (negates) the process of determining compliance with Commission rules, but also because the HC Program provides millions of dollars in subsidies to companies based on reported numbers. Without documents supporting the reported numbers, it is impossible to determine if the amounts claimed comport with Commission rules and are otherwise appropriate...For at least 18.46 percent of the beneficiaries receiving high cost, inadequate documentation makes it impossible to determine if HC support, virtually all of which is funded through consumer end-user charges, does not contain inflated expenses or gold-plated investments, or is otherwise improper.

As the Commission looks for a way to preserve the sustainability of the high-cost fund, it should consider additional safeguards not only in regard to who receives the


⁴ The report is titled, *The High Cost Program Initial Statistical Analysis of Data from the 2006/2007 Compliance Audits* and is dated October 3, 2007.

funding and at what levels, but also safeguards as to how is the money being used to benefit the goal of preserving and advancing universal service.

Conclusion

The WYOCA supports the elimination of the identical support rule. We recommend that the Commission look for ways to incorporate the overall principle of competitive and technological neutrality in its comprehensive reform of the high-cost fund. We urge the Commission to reconsider its tentative conclusion that the identical support rule be replaced with a support system based on the CETC's actual cost. The detailed accounting and reporting systems and other rules that would have to be established to implement a CETC cost-based system would soon be outgrown and is inconsistent with the general regulatory regime for wireless. Instead, we ask the Commission to focus on comprehensive reform where there is an identifiable benefit to the end users from the universal service funding.

Respectfully submitted on the 17th of April, 2008.



Bryce J. Freeman, Administrator
Wyoming Office of Consumer Advocate
2515 Warren Avenue, Suite 304
Cheyenne, WY 82002
Telephone (307) 777-5742
FAX (307) 777-5748
bfreem@state.wy.us